

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ESTATE OF DAVID MACKAY	:	
AND ESTATE OF MARJORIE MACKAY	:	
	:	DETERMINATION
for Redetermination of a Deficiency or for	:	
Refund of New York State Personal Income Tax	:	
under Article 22 of the Tax Law for the Years	:	
1967 through 1979.	:	

Petitioners, Estate of David Mackay and Estate of Marjorie Mackay, c/o Foley, Hickey, Gilbert & O'Reilly, 70 Pine Street, New York, New York 10270, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the years 1967 through 1979 (File No. 804235).

On April 29, 1988 and May 4, 1988, respectively, petitioners' representative and the Audit Division's representative waived a hearing and agreed to submit this matter for determination based upon documentary evidence, with all briefs submitted by July 1, 1988. After due consideration of the record, Doris E. Steinhardt, Administrative Law Judge, hereby renders the following determination.

ISSUE

Whether a claim for refund filed by petitioners beyond the general three- year statute of limitations for refund should be granted pursuant to the special refund authority found in Tax Law § 697(d).

FINDINGS OF FACT

1. During all of the years at issue herein, decedents, David Mackay and Marjorie Mackay¹, filed joint income tax returns with the State of New York Department of Taxation and Finance. Mrs. Mackay died a resident of the State of New York on March 9, 1979, while Mr. Mackay died a resident of the State of New York on May 12, 1980. David Mackay, Jr. is the executor of the estate of David Mackay and the administrator of the estate of Marjorie Mackay.

2. On August 14, 1951, David Mackay entered into an agreement with Helen D. Miller, the widow of the late and renowned bandleader, Glenn Miller, pursuant to which petitioner was

¹The estate of Marjorie Mackay is involved in this proceeding solely as the result of the filing of joint income tax returns by Mr. and Mrs. Mackay. Since all of the income at issue herein was generated by Mr. Mackay, all further references to petitioner shall be references to David Mackay or the estate of David Mackay.

to receive one-third of the record royalties payable to the Glenn Miller estate in connection with a recording venture. Mr. Mackay received royalty income pursuant to the agreement from 1951 through 1979.

3. In 1976, subsequent to the death of Helen D. Miller, the Miller children commenced an action against petitioner in the Superior Court, State of New Jersey for a rescission of the royalty agreement between Mrs. Miller and Mr. Mackay and for a return of all royalties paid to Mr. Mackay, plus interest. On July 13, 1979, a judgment was entered ordering petitioner to repay to the Helen D. Miller estate the sum of \$507,809.98 in royalties covering the period March 15, 1967 through December 31, 1977. The judgment also required Mr. Mackay to repay to Mrs. Miller's estate the sum of \$152,381.37 representing royalties paid to him in the years 1978 and 1979. In addition, the judgment required petitioner to pay to the Miller estate the sum of \$85,195.88 in income commissions for the period September 6, 1966 through December 31, 1976 which petitioner received as successor executor of the estate of Glenn Miller. In total, the judgment required Mr. Mackay to pay to the Miller estate the sum of \$745,387.23 in royalty and commission income paid to him from September 1966 through December 31, 1979, plus interest.

4. The Superior Court decision was appealed by the Estate of David Mackay; however, on July 13, 1982, the New Jersey Supreme Court upheld the decision of the lower court. In accordance with the final decision of the New Jersey Supreme Court, the estate of David Mackay paid to the estate of Helen D. Miller the sums of \$901,616.47, \$134,513.41 and \$113,580.51 on August 31, 1982, November 1, 1982 and April 30, 1983, respectively.

5. On or about June 30, 1983, David Mackay, Jr. filed a claim with the Internal Revenue Service for a refund of the overpayment of tax with the estate's fiduciary income tax return for the fiscal year ending April 30, 1983. The overpayment of tax was based upon the royalties and commissions that petitioner was ordered to repay to the Miller estate by virtue of the New Jersey judgment for the years 1967 through 1978. A similar claim was filed with the Internal Revenue Service on or about June 12, 1984 covering royalties and commissions paid in the year 1979. The Internal Revenue Service failed to act on the aforementioned claims. Consequently, an action was commenced against the United States of America in the District Court for the Eastern District of New York on or about January 15, 1985 for a refund of the overpayment of taxes paid on all of the income (royalties and commissions) that petitioner was ordered to repay by virtue of the New Jersey judgment for the years 1967 through 1979. Immediately after commencement of the action, the Federal government agreed to pay to Mr. Mackay's estate the full amount of the refund claimed plus interest from the dates that the claims were filed.

6. On or about July 6, 1983, David Mackay, Jr. filed a claim with the New York State Tax Commission (now, the Commissioner of Taxation and Finance) for the years 1967 through 1978 seeking a refund of \$89,550.34 pursuant to the Commissioner's special refund authority under Tax Law § 697(d). The claimed refund of \$89,550.34 represents the New York State income taxes paid by petitioner on the royalty and commission income that he was subsequently required to repay to the Miller estate pursuant to the New Jersey judgment. On or about August 15, 1984, a claim for refund in the sum of \$13,148.66 was filed by David Mackay, Jr. for the New York State income taxes paid on royalty and commission income for the year 1979. Pursuant to a formal notice dated January 28, 1985, both claims for refund were disallowed in full. Subsequent to the January 28, 1985 notice of disallowance, the Audit Division conceded that the claim for refund for the 1979 tax year was timely filed and that petitioner was due a refund for said year in the sum of \$13,148.66.

SUMMARY OF THE PARTIES' POSITIONS

7. Petitioner maintains that while the Commissioner's authority under Tax Law § 697(d) is permissive, it cannot be said that the Commissioner lacks the authority to grant a refund herein on the basis of the extraordinary circumstances involved. Based upon the conformity principal (Tax Law §§ 607[a], 622[b]) and the discretionary power of the Commissioner under Tax Law § 697(d), petitioner believes that given the unique facts of this case and the staggering amount of income which he was required to repay, it would be an egregious injustice for the Commissioner to refuse to utilize his discretionary authority to right such an obvious wrong. Petitioner asserts that the special refund authority, which permits the Commissioner to refund taxes notwithstanding any statute of limitations, would be meaningless if not invoked in circumstances such as those in the case at hand.

8. The Audit Division asserts that in order to become eligible for a refund under Tax Law § 697(d), petitioner must show that no questions of fact or law are involved and that one of two other situations exist: either that the subject moneys have been erroneously or illegally collected, or that the moneys were paid under a mistake of facts. The Audit Division argues that neither of the two situations are present in the instant matter and that therefore a refund cannot be allowed for the years 1967 through 1978 pursuant to the special refund authority found in Tax Law § 697(d).

CONCLUSIONS OF LAW

A. In the instant matter, it is undisputed that the claim for refund for the years 1967 through 1978 was filed beyond the general three-year statute of limitations for refund provided for in Tax Law § 687(a). Although the Federal claim for refund for the same years was ultimately approved by the Internal Revenue Service, it must be noted that said approval was based on the claim of right doctrine found in Internal Revenue Code § 1341. Since Article 22 of the Tax Law contains no statutory provision comparable to the Federal claim of right doctrine and since the Federal claim of right provisions are inapplicable for purposes of recomputing petitioner's New York State income tax liability (Kreiss v. State Tax Commn., 61 NY2d 916), any refund to which petitioner may be entitled must fall within the provisions of Tax Law § 697(d) which grants the Commissioner special refund authority.

B. Tax Law § 697(d) provides that:

"Special refund authority. -- Where no questions of fact or law are involved and it appears from the records of the tax commission that any moneys have been erroneously or illegally collected from any taxpayer or other person, or paid by such taxpayer or other person under a mistake of facts, pursuant to the provisions of this article, the tax commission at any time, without regard to any period of limitations, shall have the power, upon making a record of its reasons therefor in writing, to cause such moneys so paid and being erroneously and illegally held to be refunded and to issue therefor its certificate to the comptroller."

C. When Mr. Mackay filed his Federal tax returns for the years 1967 through 1978, he properly reported the commission income and royalty income he had received pursuant to the August 14, 1951 agreement executed with Mrs. Miller. Accordingly, said commission and royalty income was also properly reported on petitioner's New York State income tax returns for the years at issue pursuant to Tax Law § 612(a). Consequently, it cannot be found that the New York State personal income tax paid by Mr. Mackay for the years 1967 through 1978 on said commission and royalty income was paid under a mistake of facts as contemplated by Tax Law

§ 697(d) (Matter of Kreiss v. State Tax Commn., supra). Furthermore, it is clear that petitioner's right to receive the commission and royalty income involved a question of law which was not resolved until the July 13, 1982 decision of the New Jersey Supreme Court. Since the relief provided by Tax Law § 697(d) is not applicable in the instant matter and since there exists no refund provision in New York statute similar to the Federal claim of right doctrine found in Internal Revenue Code § 1341, the denial of petitioner's claim for refund for the years 1967 through 1978 must be sustained.

D. In accordance with Finding of Fact "6", supra, petitioner's claim for refund for the 1979 tax year was timely filed. Accordingly, petitioner is entitled to a refund of \$13,148.66 together with any interest which is legally due and owing.

E. The petition of the Estate of David Mackay and the Estate of Marjorie Mackay is granted to the extent indicated in Conclusion of Law "D", supra; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

August 19, 1988

/s/ Doris E.

Steinhardt

ADMINISTRATIVE LAW JUDGE